



FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL

40 CFR Part 1900

[Docket Number 2023-001]

RIN 3121-AA04

Revising Scope of the Mining Sector of Projects that are Eligible for Coverage

Under Title 41 of the Fixing America's Surface Transportation Act

AGENCY: Federal Permitting Improvement Steering Council.

ACTION: Proposed Rule.

SUMMARY: The Federal Permitting Improvement Steering Council (Permitting Council) proposes to amend its regulations to revise the scope of “mining” as a sector with infrastructure projects eligible for coverage under Title 41 of the Fixing America’s Surface Transportation Act (FAST-41). The Permitting Council added “mining” as a FAST-41 sector in January 2021. This proposed rule would: (1) revise the FAST-41 “mining” sector to apply solely to critical minerals mining projects; and (2) expand the scope of the sector to include infrastructure constructed to support critical minerals supply chain activities, including critical minerals beneficiation, processing, and recycling. The proposed modification will help ensure that qualified critical minerals supply chain projects beyond critical minerals mining can obtain FAST-41 coverage. FAST-41 was enacted to improve the timeliness, predictability, transparency, and accountability of the Federal environmental review and authorization processes for covered infrastructure projects. FAST-41 coverage does not predetermine or affect the outcome of any Federal decision-making process with respect to a covered project, or modify any required environmental review or public or tribal consultation process.

DATES: Please send your comments on this proposal to the Permitting Council Office of the Executive Director on or before [INSERT DATE 30 DAYS FROM THE DATE OF

PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: You may send comments, identified by Permitting Council Docket Number 2023-001 or RIN 3121-AA04, by any of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for sending comments.
- Mail: Federal Permitting Improvement Steering Council, Office of the Executive Director, 1800 M St. NW, Suite 6006, Washington, DC 20036, Attention: RIN 3121-AA04.

FOR FURTHER INFORMATION CONTACT: John G. Cossa, General Counsel, Federal Permitting Improvement Steering Council, 1800 M St. NW, Suite 6006, Washington, DC 20036, john.cossa@fpisc.gov, or by telephone at 202-255-6936.

Persons who use a telecommunications device for the deaf may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 to contact this individual during normal business hours or to leave a message at other times. FIRS is available 24 hours a day, 7 days a week. You will receive a reply to a message during normal business hours.

SUPPLEMENTARY INFORMATION:

I. FAST-41 and the Permitting Council

Established in 2015 by Title 41 of the Fixing America's Surface Transportation Act (FAST-41), 42 U.S.C. 4370m *et seq.*, the Permitting Council is a unique Federal agency charged with improving the transparency and predictability of the Federal environmental review and authorization process for certain infrastructure projects. The Permitting Council is comprised of the Permitting Council Executive Director, who serves as the Council Chair; 13 Federal agency Council members (including deputy secretary-level designees of the Secretaries of Agriculture, Army, Commerce, Interior, Energy, Transportation, Defense, Homeland Security, and Housing and Urban Development, the Administrator of the Environmental Protection Agency, and the Chairs

of the Federal Energy Regulatory Commission, Nuclear Regulatory Commission, and the Advisory Council on Historic Preservation); and the Chair of the Council on Environmental Quality and the Director of the Office of Management and Budget. 42 U.S.C. 4370m-1(a) & (b).

The Permitting Council coordinates Federal environmental reviews¹ and authorizations² for projects that seek and qualify for FAST-41 coverage. FAST-41 covered projects are entitled to comprehensive permitting timetables and transparent, collaborative management of those timetables on the Federal Permitting Dashboard in compliance with FAST-41 procedural requirements. 42 U.S.C. 4370m-2(c) & (d). Sponsors of FAST-41 covered projects also benefit from the direct engagement of the Permitting Council Executive Director and the Permitting Council members in timely identification and resolution of permitting issues that affect covered projects' permitting timetables. The Permitting Council Executive Director additionally may transfer funds from the Environmental Review and Improvement Fund (ERIF) to Federal agencies and state, local, and tribal governments to make the environmental review and authorization process for FAST-41 covered projects more timely and efficient. 42 U.S.C. 4370m-8(d)(3).

II. FAST-41 Infrastructure Sectors and Covered Project Criteria

FAST-41 provides that activities located in the United States that require authorization or environmental review by a Federal agency involving construction of infrastructure that are in the following sectors may be eligible for FAST-41 coverage: (1)

¹ 42 U.S.C. 4370m(11) (defining “environmental review” as “the agency procedures and processes for applying a categorical exclusion or for preparing an environmental assessment, an environmental impact statement, or other document required under [the National Environmental Policy Act]”).

² 42 U.S.C. 4370m(3) (defining “authorization” as “any license, permit, approval, finding, determination, or other administrative decision issued by an agency and any interagency consultation that is required or authorized under Federal law in order to site, construct, reconstruct, or commence operations of a covered project administered by a Federal agency or, in the case of a State that chooses to participate in the environmental review and authorization process in accordance with [42 U.S.C.] 4370m–2(c)(3)(A) . . . , a State agency”).

renewable energy production; (2) conventional energy production; (3) electricity transmission; (4) surface transportation; (5) aviation; (6) ports and waterways; (7) water resource projects; (8) broadband; (9) pipelines; (10) manufacturing; (11) semiconductors; (12) artificial intelligence and machine learning; (13) high-performance computing and advanced computer hardware and software; (14) quantum information science and technology; (15) data storage and data management; (16) cybersecurity; (17) carbon capture; and (18) energy storage. 42 U.S.C. 4370m(6)(A). FAST-41 authorizes the Permitting Council to designate additional sectors by majority vote of the Permitting Council members. *Id.* On January 4, 2021, a majority of the Permitting Council voted to designate “mining” as a FAST-41 sector, and on January 8, 2021, the Permitting Council Promulgated a final rule adding a new Part 1900 to Title 40 of the Code of Federal Regulations (CFR) to reflect this designation. 86 FR 1281 (Jan. 8, 2021); *see* 40 CFR 1900.1 & 1900.2.

To qualify for FAST-41 coverage, an infrastructure project in a FAST-41 sector must be located in the United States, require environmental review and authorization by a Federal agency, and meet one of the four sets of FAST-41 covered project criteria: (1) the “objective” criteria; (2) the “carbon capture” criterion; (3) the “Tribal” criteria; or the (4) “discretionary” criteria. 42 U.S.C. 4370m(6)(A).

Under the “objective” criteria, a project could qualify for FAST-41 coverage if it: (i) is subject to review under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*; (ii) is likely to require a total investment of \$200 million or more; and (iii) does not qualify for abbreviated authorization or environmental review processes under any applicable law. 42 U.S.C. 4370m(6)(A)(i). The majority of FAST-41 covered projects are covered under the “objective” criteria.

Alternatively, under the “carbon capture” criterion, an infrastructure project in a FAST-41 sector could qualify for FAST-41 coverage if the project is covered by a

programmatic plan or environmental review developed for the primary purpose of facilitating development of carbon dioxide pipelines. 42 U.S.C. 4370m(6)(A)(ii).

To qualify for FAST-41 coverage under the “Tribal” criteria, a the project must be: (i) subject to NEPA; (ii) sponsored by an Indian Tribe (as defined in 25 U.S.C. 5304), an Alaska Native Corporation, a Native Hawaiian organization (as defined in section 20 U.S.C. 7517), the Department of Hawaiian Home Lands, or the Office of Hawaiian Affairs; and (iii) located in whole or in part on lands owned or under the jurisdiction of the project sponsor. 42 U.S.C. 4370m(6)(A)(iii).

Finally, a project also could qualify for FAST-41 coverage under the “discretionary” criteria if the project: (i) is subject to NEPA; and (ii) in the opinion of the Permitting Council, the size and complexity of the project make it likely to benefit from the enhanced oversight and coordination provided by FAST-41, including projects likely to require environmental review and authorization from multiple agencies or projects for which the preparation of an environmental impact statement is required. 42 U.S.C. 4370m(6)(A)(iv).

Pursuant to section 11503(b) of the FAST Act, projects for which the U.S. Department of Transportation is the sole lead agency under NEPA, and projects that are subject to authorization under Department of the Army’s Project Acceleration Procedures pursuant to 33 U.S.C. 2348, are not FAST-41 covered projects. Pub. L. 114–94, 129 Stat. 1312, 1692 (Dec. 4, 2015); *see also* 42 U.S.C. 4370m(6)(B). Additionally, Federal environmental reviews and authorizations issued pursuant to Title 23, 46, or 49 of the U.S. Code, including direct loan and loan guarantee programs, are not subject to the requirements of FAST-41. 129 Stat. at 1692.

The proposed revision of the FAST-41 mining infrastructure sector is not a determination by the Permitting Council that any particular mining project will qualify as a FAST-41 covered project, and it does not predetermine the outcome of the Federal

decision-making process with respect to any covered project. FAST-41 is a voluntary program governed by the eligibility criteria in 42 U.S.C. 4370m(6) and the procedural requirements of 42 U.S.C. 4370m-2 and 4370m-4. To become a FAST-41 covered project, a critical minerals mining or critical minerals supply chain project sponsor, like project sponsors in the other FAST-41 sectors, must first demonstrate that its project meets a covered project criteria pursuant to 42 U.S.C. 4370m(6) by submitting a notice of the initiation of a proposed covered project (also known as a FAST-41 Initiation Notice or “FIN”) to the Permitting Council Executive Director and the appropriate facilitating or lead agency.³ 42 U.S.C. 4370m-2(a)(1). Within 14 days of receiving the FIN, the Permitting Council Executive Director must create an entry for the project on the Federal Permitting Dashboard,⁴ which means that the project is a FAST-41 covered project, unless the Executive Director or the facilitating or lead agency determines that the project is not a FAST-41 covered project. 42 U.S.C. 4370m-2(b)(2)(A)(ii).

Substantively, FAST-41 provides for timely Federal agency review, enhanced interagency coordination, predictability, and accountability in the Federal decision-making process for covered projects, and the option to transfer funds to Federal, state, local, and tribal governments to facilitate timely and efficient environmental reviews and authorizations of covered projects. Participation in the FAST-41 program can provide covered project sponsors with increased certainty of timely Federal action in accordance with publicly available project-specific permitting timetables. 42 U.S.C. 4370m-2; *see* Permitting Dashboard at <https://www.permits.performance.gov/>. FAST-41 provides for early coordination of agencies’ schedules and synchronization of environmental reviews and related authorizations without altering the substance or scope of those Federal agency efforts. 42 U.S.C. 4370m-4 (Coordination of required reviews). It provides mechanisms

³ Project FINs can be filled out or submitted online via the Permitting Dashboard at <https://www.permits.performance.gov/fpisc-content/become-fast-41-covered-project>.

⁴ Available at <https://www.permits.performance.gov/>.

for resolving permitting related disputes. 42 U.S.C. 4370m-2(c)(2)(C) (Dispute resolution). FAST-41 further ensures agency accountability and transparency by providing clear processes and notice requirements for altering project permitting timetables. 42 U.S.C. 4370m-2(c)(2)(D), (E), & (F). The statute also allows the Executive Director to transfer ERIF funds to Federal agencies and state, local, and tribal governments to facilitate timely and efficient environmental reviews and authorizations for the project. 42 U.S.C. 4370m-8(d)(3).

FAST-41 does not mandate or predetermine any substantive result in the permitting process. The provisions of FAST-41 do not supersede or alter any internal procedure or decision-making authority of any Federal agency or official. *See* 42 U.S.C. 4370m-6(d)(1) (FAST-41 does not supersede, amend, or modify any Federal statute or affect the responsibility of any Federal agency officer to comply with or enforce any statute); *id.* 4370m-6(e)(1) (“Nothing in [FAST-41] preempts, limits, or interferes with . . . any practice of seeking, considering, or responding to public comment”); *id.* 4370m-6(e)(2) (“Nothing in [FAST-41] preempts, limits, or interferes with . . . any power, jurisdiction, responsibility, or authority that a Federal, State, or local governmental agency, metropolitan planning organization, Indian tribe, or project sponsor has with respect to carrying out a project or any other provisions of law applicable to any project, plan, or program.”); *see also id.* 4370m-11 (NEPA is not amended by FAST-41). Accordingly, revising the FAST-41 mining infrastructure sector will not grant any permit, authorization, or approval for a covered project. *See* 42 U.S.C. 4370m-6(d)(2) (“Nothing in [FAST-41] . . . creates a presumption that a covered project will be approved or favorably reviewed by any agency”).

III. Proposal to Revise and Expand the Scope of the FAST-41 Mining Infrastructure Sector

In conjunction with a public notice-and-comment rulemaking effort, on January 4,

2021, the Permitting Council voted to designate “mining” as a FAST-41 sector. 86 FR 1281 (Jan. 8, 2021). The definition of “mining” finally adopted by the Permitting Council was broad, and encompassed “the process of extracting ore, minerals, or raw materials from the ground” except for oil and gas extraction. 40 CFR 1900.1. Accordingly, any infrastructure project in the “mining” sector—including any critical minerals mining project—currently can become a FAST-41 covered project, provided that the project meets a FAST-41 “covered project” criteria described above.

The Permitting Council coordinates Federal environmental reviews and authorizations for projects that seek and obtain FAST-41 coverage. Sponsors of FAST-41 covered projects are entitled to comprehensive permitting timetables and transparent, collaborative management of those timetables on the public-facing Federal Permitting Dashboard. Project sponsors additionally must be consulted in establishing and managing FAST-41 covered project permitting timetables, and have access to issue elevation and dispute resolution processes that ensure unresolved project permitting issues are expeditiously resolved by high-level Federal decision makers. The Permitting Council Executive Director additionally may transfer funds from the ERIF to Federal agencies and state, local, and tribal governments to make environmental reviews and authorizations for FAST-41 covered projects more timely and efficient. The consultation, enhanced interagency coordination, transparency, issue elevation, funding transfer, and Permitting Dashboard management requirements of FAST-41 represent a significant departure from the business-as-usual scenario for the Federal infrastructure review and authorization process.

To the maximum extent practicable, the Permitting Council is committed to providing Federal environmental review and permitting resources toward infrastructure projects that are most likely to help develop a reliable and environmentally and socially responsible supply of critical minerals necessary for national security, economic

prosperity, and fighting the climate crisis. This includes encouraging project sponsors to adopt recognized best practices for tribal and community engagement, such as development of a “Community Benefits Agreement,”⁵ providing financial support for Tribes and communities to allow for independent technical review of mining proposals, making environmental monitoring data publicly available, and taking other steps to maximize transparency, engagement, and responsiveness to local concerns.

It also is important to inform prospective project sponsors, whose projects are the primary means to achieve these objectives, that their qualified project proposals are welcome for consideration under the FAST-41 rubric. The Biden-Harris Administration has identified the urgent need for better coordination of environmental reviews, permitting processes, consultations, and other agency decisions to facilitate improved efficiency and effectiveness of critical minerals project delivery, and improved transparency and predictability in the Federal environmental review and authorization process for critical minerals projects.

The Administration has called for the application of all current best practices for improving communication and coordination with state regulators, Tribes, and stakeholders, including industry, affected communities, environmental justice leaders, and labor unions, in reviewing and authorizing critical minerals projects.⁶ FAST-41 is an ideal tool for achieving these objectives, and the Permitting Council believes that Federal resources should be targeted, to the maximum extent practicable, toward the pool of projects that are most likely to deliver on the Administration’s critical minerals priorities and in line with publicly stated mining reform principles.⁷

⁵ See <https://www.energy.gov/diversity/community-benefit-agreement-cba-toolkit>.

⁶ See <https://www.doi.gov/sites/doi.gov/files/biden-harris-administration-fundamental-principles-for-domestic-mining-reform.pdf>; *see also* 42 U.S.C. 4370m-1(c)(2)(B) (FAST-41 best practices requirement); FY 2022 Best Practices at <https://www.permits.performance.gov/fpisc-content/fy-2022-recommended-best-practices-report>.

⁷ See <https://www.doi.gov/sites/doi.gov/files/biden-harris-administration-fundamental-principles-for-domestic-mining-reform.pdf>.

Accordingly, the Permitting Council proposes to refine the FAST-41 mining infrastructure sector to: (i) limit the scope of potentially covered mining projects to those involving the extraction of critical minerals, as defined by section 7002 of the Energy Act of 2020⁸ and listed by the Director of the U.S. Geological Survey at 87 FR 10381 (Feb. 24, 2022), including any amendments to the definition or list of critical minerals by the U.S. Geological Survey or by Act of Congress; and (ii) critical mineral supply chain activities, including critical mineral beneficiation, processing, and recycling.

IV. Effect of Revising FAST-41 Mining Infrastructure Sector and Next Steps

Revising the FAST-41 mining sector as proposed would enable sponsors of qualified critical minerals mining, beneficiation, processing, and recycling projects to seek the same benefits of FAST-41 coverage that are currently available to qualified projects in the statutorily identified FAST-41 sectors. Sponsors of infrastructure projects that are not involved in critical minerals-related activities would be ineligible for FAST-41 coverage unless their projects were eligible for coverage under another FAST-41 infrastructure sector.⁹ In the time since the Permitting Council voted to designate mining as a FAST-41 sector in January 2021, the Permitting Council has not received any FINs seeking FAST-41 coverage for a non-critical minerals mining project. Limiting the mining sector to critical minerals mining infrastructure projects is not expected to result in a substantial change in the number of mining related project proposals.

After considering the comments received in response to this proposed rule, the Permitting Council will determine whether to revise the scope of the current mining sector. The Permitting Council subsequently will vote on any proposed modifications to the current FAST-41 mining infrastructure sector. If a majority of the Permitting Council

⁸ Pub. L. No. 116-260, 134 Stat. 1182, 2562 (Dec. 27, 2020), codified at 30 U.S.C. 1606.

⁹ See Federal Permitting Improvement Steering Council, Adding Mining as a Sector of Projects Eligible for Coverage Under Title 41 of the Fixing America's Surface Transportation Act, Proposed Rule, 85 FR 75998, 75999-76000 (Nov. 27, 2020) (describing how the Permitting Council applies the FAST-41 infrastructure sectors to project FINs).

votes in favor of modification, the Permitting Council will promulgate a final rule amending 40 CFR part 1900 consistent with the adopted modification. The Permitting Council seeks public comment on all aspects of this proposal and will address all substantive comments that it receives in response to this proposal in the *Federal Register* notice for any final rule.

ECONOMIC ANALYSIS

Revising the FAST-41 mining infrastructure sector could result in improved timeliness, predictability, and transparency associated with the projects that ultimately become FAST-41 covered projects, and for the Federal agencies participating in the FAST-41 process for those covered projects. However, quantifying any potential economic benefits that might result from revising the FAST-41 mining sector is speculative. Simply providing the option of FAST-41 coverage to qualified critical minerals mining and critical minerals supply chain projects, some of which are currently eligible for FAST-41 coverage under the existing FAST-41 mining sector, does not indicate how many, if any, additional critical minerals project FINs will be submitted to the Permitting Council, or how many projects ultimately will become covered projects. Nor does it guarantee that any economic benefits necessarily would result from such coverage, particularly given that FAST-41 only imposes coordination, transparency, and disclosure requirements related to the Federal environmental review and authorization process for a covered infrastructure project, and not any substantive outcome.

Foreclosing FAST-41 eligibility for project sponsors of non-critical minerals mining projects will ensure that such project sponsors will be unable to derive the benefits of FAST-41 coverage. However, quantification of any costs to non-critical mineral mining project sponsors who may be no longer eligible to seek FAST-41 coverage is likewise speculative, particularly given that no such project sponsor has sought or obtained FAST-41 coverage since mining was added as a FAST-41 sector in January 2021. Moreover,

quantification of economic benefits or costs to any specific project sponsor is speculative because the permitting and environmental review requirements and permitting timetables for each covered project are unique.

Although the Permitting Council cannot predict how many critical minerals mining and supply chain projects may become covered projects, the number likely will be small. Based on historical experience implementing the current mining sector and the other FAST-41 sectors, and the fact that only a portion of project sponsors, including mining project sponsors, that seek FAST-41 coverage succeed in obtaining it, the Permitting Council anticipates that the proposed modification to the FAST-41 mining sector will result in the submission of 15 or fewer additional project FINs, and likely 10 or fewer additional covered projects. Because critical mineral mining projects are already included in the current FAST-41 mining sector, any increase likely would be due to the expansion of the sector to include critical mineral beneficiation, processing, and recycling infrastructure projects.

The eligibility criteria for FAST-41 coverage are selective; generally, only the largest projects in a given sector become FAST-41 covered projects. All but two of the projects that have become FAST-41 covered projects have been covered pursuant to the FAST-41 “objective” criteria, which requires a minimum economic value of \$200 million.¹⁰ See 42 U.S.C. 4370m(6)(A)(i). Since the enactment of FAST-41 in 2015, a total of 71 projects have become covered projects. Of these projects, 37 were covered as the result of successfully submitted FINs that met the FAST-41 coverage criteria. The remaining 34 projects were statutorily covered as pending projects pursuant to 42 U.S.C. 4370m-1(c)(1)(A)(i) and 4370m-2(b)(2)(A)(i) immediately after the enactment of FAST-41. Of the 18 FAST-41 sectors, only the renewable energy sector, which has been in

¹⁰ The other two projects, the Santa Fe Indian School Broadband project, and the Alaska Fiber Optic Segment 1 Broadband project, became FAST-41 covered projects pursuant to the “Tribal criteria” at 42 U.S.C. 4370m(6)(A)(ii).

place since the enactment of FAST-41, represents over 10 FIN-initiated FAST-41 covered projects.

The proposed refinements of the FAST-41 mining infrastructure sector are unlikely to result in a substantial change in the number of projects that may seek and obtain FAST-41 coverage. Based on historical experience, only a portion of mining related FINs likely will become covered projects. Since the enactment of FAST-41 in 2015, the Permitting Council has received seven FINs for projects that involve mining that may potentially have been eligible for coverage under the statutory FAST-41 sectors (e.g., conventional energy) or the mining sector that was designated as a FAST-41 sector in January 2021. Of these FINs, all but one were either rejected for failing to meet the FAST-41 eligibility criteria or were withdrawn by the project sponsor for other reasons. Since the Permitting Council voted to designate mining as a FAST-41 sector in January 2021, only two project sponsors have sought FAST-41 coverage for their mining projects, both of which were critical minerals mining projects. One project sponsor did not perfect its FIN and withdrew its application, and the other mining project has become a FAST-41 covered project.¹¹ The proposed revision to expressly expand the potential for FAST-41 coverage to critical minerals beneficiation, processing, and recycling infrastructure projects similarly is not expected to result in a significant number of new FAST-41 covered projects. Accordingly, although the Permitting Council believes the proposed revision will result in FAST-41 coverage for some potentially important critical minerals supply chain infrastructure projects, the Permitting Council does not believe that this change alone would result in receiving a large number of new FINs—likely 15 or fewer—for FAST-41 coverage in the revised mining sector. The Permitting council believes that a smaller subset of these FINs—likely 10 or fewer—will result in new

¹¹ See <https://www.permits.performance.gov/permitting-project/fast-41-covered-projects/south32-hermosa-critical-minerals-project>.

FAST-41 covered projects.

Revising the FAST-41 mining sector could result in reduced costs for any critical minerals mining and supply-chain project sponsor that obtains FAST-41 coverage for its project and potentially for the Federal agencies with review and permitting responsibilities for the covered project, by virtue of the potentially improved timeliness, predictability, and transparency in the process; associated increased Federal agency coordination; and reduced duplication of Federal and project sponsor effort. However, these benefits are difficult to quantify, particularly given that the Federal permitting and environmental review requirements and the permitting timetable for each project are unique and vary widely from project to project. Because the Permitting Council cannot know in advance precisely how many projects will be covered as a result of the proposed modification to the FAST-41 mining sector, what the permitting or environmental review requirements might be for any potential future covered mining project, or what opportunities might exist to coordinate any Federal agency reviews that might be necessary for any such covered project, it is impossible to predict with any reliability or specificity what, if any, economic benefit might broadly accrue as a result of revising the FAST-41 mining sector.

The proposed modifications to the FAST-41 mining sector will not directly increase or decrease the costs to agencies of complying with the substantive provisions of FAST-41. Although administering the provisions of FAST-41 have costs associated with them (including staff and resources to administer and coordinate permitting timetables and associated reporting), it is unlikely that the proposed changes to the FAST-41 mining sector will increase the number of FAST-41 covered projects such that these costs would increase significantly. There likely would be costs to the Permitting Council associated with any additional project that might become a covered project, but that is true with or without the proposed modifications, and administering such projects pursuant to the

requirements of FAST-41 is a Permitting Council core function for which Congress provides funding in the ERIF.

FAST-41 does not impose any regulatory requirements on covered project sponsors; the implementation obligations of FAST-41 fall primarily on the government. However, because FAST-41 is a voluntary program, sponsors of mining projects potentially eligible for FAST-41 coverage would incur some costs associated with seeking FAST-41 coverage. These costs associated with a request to be a covered project likely are small. Seeking FAST-41 coverage involves formulating and submitting a project FIN, which is expected to take only a few hours. *See* 42 U.S.C. 4370m-2(a)(1)(C). Because the Permitting Council anticipates receiving few additional project FINs as a result of the proposed modifications to the FAST-41 mining sector, and the burden associated with preparing a FIN is minimal, the additional economic cost associated with the proposed modifications the FAST-41 mining sector, if any, would be negligible. The Permitting Council invites comment on this economic analysis, including the expectations about the likely number of FAST-41 applications with and without these changes.

PROCEDURAL MATTERS

Regulatory Planning and Review (E.O. 12866) and Improving Regulation and Regulatory Review (E.O. 13563)

This action is a significant regulatory action that was submitted to OMB for review.

Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), 5 U.S.C. 601 *et seq.*

Congress enacted the RFA to ensure that government regulations do not unnecessarily or disproportionately burden small entities. Small entities include small businesses, small governmental jurisdictions, and small not-for-profit enterprises. The

RFA generally requires that Federal agencies prepare a regulatory flexibility analysis for regulatory proposals that are subject to the notice and comment rulemaking requirements of 5 U.S.C. 503 if the proposal would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities. *See* 5 U.S.C. 601-612. Pursuant to 5 U.S.C. 605(b), the Permitting Council certifies that the proposed modifications to the pool of FAST-41 eligible mining projects and expansion of potential FAST-41 eligibility to sponsors of qualified critical mineral beneficiation, processing, and recycling projects that are not already eligible for FAST-41 coverage under any of the statutory FAST-41 sectors, will not have a significant economic impact on a substantial number of small entities.

As explained in the Economic Analysis section of this proposal, the Permitting Council anticipates that the revision of the FAST-41 mining sector will result in the submission of 15 or fewer additional FINs, at least some of which, based on the Permitting Council's past experience with project FINs that involve mining and the other FAST-41 sectors, will not become FAST-41 covered projects. Though the Permitting Council does not conduct an analysis of the business structures of FAST-41 project sponsors to determine whether they are small entities, it is possible that at least some of the 15 or fewer project sponsors that submit FINs for mining projects could be small entities. The Permitting Council reviewed the Small Business Administration size standards for small businesses across the mining industry, and, depending on the nature of the minerals mined, the threshold for small North American Industry Classification System (NAICS) Sector-21 mining entities ranges from below 250 employees to below 1,500 employees. Because 15 or fewer entities likely will be affected, the Permitting Council does not anticipate that the proposed revisions to the FAST-41 mining sector will affect substantial number of small entities.

Nor will revising the FAST-41 mining sector significantly or disproportionately

impose costs on any small entity that may be impacted. The requirements for submitting a project FIN are simple and not burdensome. The FAST-41 statute only requires the project sponsor to formulate and send to the Permitting Council Executive Director and the lead or facilitating agency a project FIN that contains: (1) a statement of the purpose and objectives of the project; (2) a description of the general project location; (3) any available geospatial information about project and environmental, cultural, and historic resource locations; (4) a statement regarding the technical and financial ability of the project sponsor to construct the proposed project; (5) a statement of any Federal financing, environmental reviews, and authorizations anticipated to be required to complete the proposed project; and (6) an assessment that the proposed project meets the definition of a covered project pursuant to 42 U.S.C. 4370m(6)(A) with supporting rationale. 42 U.S.C. 4370m-2(a)(1)(A) & (C). Any project sponsor credibly seeking Federal authorization for a project that requires \$200 million or more in investment will have the information required to submit a project FIN readily available, and preparing and submitting a project FIN should require only a few hours of effort. FAST-41 contains no pre-FIN requirements (although project sponsors are free to consult the Permitting Council with any questions about the FAST-41 program and FIN preparation or submission), and there are no regulations implementing FAST-41 that impose any additional requirements on the project sponsor. The lead or facilitating agency and the Executive Director will review the FIN in accordance with 42 U.S.C. 4370m-2(a)(1) and (b)(2) and associated guidance¹² to determine whether the project is a FAST-41 covered

¹² See OMB M-17-14, Guidance to Federal Agencies Regarding the Environmental Review and Authorization Process for Infrastructure Projects (2017 Guidance) (Jan. 13, 2017) <https://www.permits.performance.gov/tools/fast-41-implementation-guidance>; Permitting Council Executive Director Role and Responsibilities in FAST-41 Project Coverage Determinations, Executive Director Memorandum (Jan. 12, 2021) <https://www.permits.performance.gov/documentation/ed-memo-ed-role-and-responsibilities-fast-41-project-coverage-determinations>; see also In re Atlantic Shores North, Executive Director Final Determination of Covered Status No. 2022-02 (Sep. 2, 2022), <https://www.permits.performance.gov/fpisc-content/fpisc-ed-final-determination-covered-project-status-re-atlantic-shores-north>.

project. If the project is a covered project, FAST-41 imposes no requirements or obligations on the project sponsor that are additional to those imposed by the substantive Federal authorization or environmental review statutes that otherwise apply to the project. As explained in the Economic Analysis section of this proposal, any potential economic benefits that might accrue to a covered project sponsor by virtue of the project's FAST-41 covered status are speculative and project-specific. Accordingly, the proposed modifications to the FAST-41 mining sector will not significantly affect a substantial number of small entities, and the RFA does not apply.

Unfunded Mandates Reform Act (UMRA), 2 U.S.C. 1501 *et seq.*

The proposed rule does not impose an unfunded mandate on state, local, or tribal governments, or on the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on state, local, or tribal governments or the private sector. Therefore, a statement containing the information required by the UMRA is not required. The proposed rule also is not subject to the requirements of UMRA section 203 because it contains no regulatory requirements that might significantly or uniquely affect small governments. The proposed rule contains no requirements that apply to small governments, nor does it impose obligations upon them.

Federalism (E.O. 13132)

This action does not have federalism implications under E.O. 13132. The proposed rule will not have a substantial direct effect on the states, on the relationship between the Federal Government and the states, or on the distribution of power and responsibilities among the levels of government. The proposal affects only the eligibility of mining project proponents and certain critical minerals supply chain project sponsors to participate in the voluntary FAST-41 program; it will not affect the obligations or rights of states or local governments or state or local governmental entities.

Civil Justice Reform (E.O. 12988)

This proposal complies with section 3(a) of E.O. 12988, which requires agencies to review all rules to eliminate errors and ambiguity and to write all regulations to minimize litigation. This rule also meets the criteria of section 3(b)(2), which requires agencies to write all regulations in clear language with clear legal standards.

Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*

The PRA provides that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number issued by OMB. Collections of information include requests and requirements that an individual, partnership, or corporation obtain information, and report it to a Federal agency. *See* 44 U.S.C. 3502(3); 5 CFR 1320.3(c) & (k). The proposed rule does not involve an agency request for information, nor does it require an information response. The proposal would not alter any of the other FAST-41 eligibility criteria or implementation of FAST-41, and does not change the information collected from project sponsors that seek FAST-41 coverage. The proposal could result in a small increase in the number of project sponsors submitting FINs to the Permitting Council.

NEPA, 42 U.S.C. 4321 *et seq.*

NEPA requires agencies to consider the reasonably foreseeable environmental effects of major Federal actions significantly affecting the quality of the human environment. The proposed rule does not make any project-level decisions and does not affect the human environment. By statute, in order to be a FAST-41 covered project, the project must be subject to NEPA review or a NEPA equivalent process, which FAST-41 does not alter. 42 U.S.C. 4370m(6)(A); *id.* 4370m-4; *id.* 4370m-11 (NEPA unaffected). FAST-41 focuses on facilitating interagency coordination and agency accountability for administering Federally directed environmental reviews and permitting timetables. The statute expressly does not supersede NEPA or affect any internal procedure or decision-

making authority of any agency. *See* 42 U.S.C. 4370m-6(d)(2); 42 U.S.C. 4370m-6(d)(1) (FAST-41 does not supersede, amend, or modify any Federal statute or affect the responsibility of any Federal agency officer to comply with or enforce any statute); 42 U.S.C. 4370m-6(e)(1) (“Nothing in [FAST-41] preempts, limits, or interferes with . . . any practice of seeking, considering, or responding to public comment”); 42 U.S.C. 4370m-6(e)(2) (“Nothing in [FAST-41] preempts, limits, or interferes with . . . any power, jurisdiction, responsibility, or authority that a Federal, State, or local governmental agency, metropolitan planning organization, Indian tribe, or project sponsor has with respect to carrying out a project or any other provisions of law applicable to any project, plan, or program.”); 42 U.S.C. 4370m-11 (providing that FAST-41 does not amend NEPA). Because FAST-41 coverage does not alter or affect the discretion of any agency to approve or deny any permit or authorization for any project, extending potential FAST-41 eligibility to otherwise qualified critical minerals mining, beneficiation, processing, and recycling projects does not make any such project more or less likely to be permitted, authorized, or constructed, or any environmental effect that may be associated with such a project to occur. *See* 42 U.S.C. 4370m-6(d)(2) (“Nothing in [FAST-41] . . . creates a presumption that a covered project will be approved or favorably reviewed by any agency”). Based on this analysis, the Permitting Council has preliminarily determined that this rulemaking action is not a major Federal Action under NEPA and would not impact the human environment.

Effects on the Energy Supply (E.O. 13211)

This proposed rule is not a significant energy action for the purposes of E.O. 13211 because it will not have any discernible effect on the energy supply. Revising the FAST-41 mining sector to focus on critical minerals mining and critical minerals beneficiation, processing, and recycling will not itself extend FAST-41 coverage to any specific project—energy related or otherwise—nor will it permit or authorize any mining

project. Qualified applicants must first seek and obtain FAST-41 coverage pursuant to FAST-41 statutory criteria. Participation in the FAST-41 program does not alter any agency's existing discretion to approve or deny project permits or authorizations, and does not make ultimate project authorization more or less likely. Accordingly, the proposal to add mining as a FAST-41 sector will not affect the supply, distribution, or use of energy, and is not a "significant energy action" for the purpose of E.O. 13211.

List of Subjects in 40 CFR Part 1900

Critical minerals, Infrastructure, Mineral beneficiation, Mineral processing, Mineral recycling, Mineral resources, Mines, Permitting, Reporting and recordkeeping requirements, Underground mining.

For the reasons stated in the preamble, and under the authority stated below, the Federal Permitting Improvement Steering Council proposes to revise part 1900 to title 40 of the Code of Federal Regulations as follows:

PART 1900 FEDERAL PERMITTING IMPROVEMENT

1. The authority citation for part 1900 continues to read as follows:

Authority: 42 U.S.C. 4370m *et seq.*

2. Revise § 1900.1 to read as follows:

§ 1900.1 Definitions.

For the purposes of this part, the following terms shall have the meaning indicated:

Beneficiation means the preparation of ores to regulate the size (including crushing and grinding) of the product, to remove unwanted constituents, or to improve the quality, purity, or grade of a desired product.

Critical Mineral has the meaning given the term in section 7002(a) of the Energy Act of 2020 (30 U.S.C. 1606(a)) and enumerated

by the Director of the U.S. Geological Survey at 87 FR 10381 and any successive U.S. Geological Survey Director enumerations made pursuant to that authority, and any amendments to the enumerations by Act of Congress.

Critical Minerals Project means a project for which the primary product or co-product by economic value is a critical mineral.

Extraction means the activities performed to extract or harvest minerals or natural resources from the ground or a body of water, including, but not limited to, by operating equipment to extract or harvest minerals or natural resources from mines and wells, or to extract minerals or natural resources from the waste or residue of prior extraction.

FAST-41 means Title 41 of the Fixing America's Surface Transportation Act, 42 U.S.C. 4370m *et seq.*

Federal Permitting Improvement Steering Council or *Permitting Council* means the Federal agency established pursuant to 42 U.S.C. 4370m-1(a).

Mining means a process for which the primary purpose is extracting minerals from the ground. Mining does not include the process of extracting oil or natural gas.

Processing means the refining of materials, including the treating, baking, and coating processes used to convert raw products into constituent materials.

Recycling means the process of collecting and processing spent materials and devices and turning the materials and devices into raw materials or components that can be reused either partially or completely.

3. Amend § 1900.2 by revising paragraph (a) to read as follows:

§ 1900.2 FAST–41 sectors.

* * * * *

(a) Critical minerals mining, extraction, beneficiation, processing,
and recycling.

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Eric Beightel,

Executive Director,

Federal Permitting Improvement Steering Council.

[FR Doc. 2023-20270 Filed: 9/21/2023 8:45 am; Publication Date: 9/22/2023]